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IN THE

Supreme Court of the United States

March Term, 1971

No. ~~17981~~ 70-254

SMITH TUG & BARGE CO., a corporation, and J. B. LANPHER, BIG CREEK & TELOCASET CO., an Oregon corporation, and MARIBETH W. COLLINS, ELMER R. GOUDY and ALTON L. COLLINS, personal representatives of the Estate of TRUMAN W. COLLINS,
Petitioners,

v.

COLUMBIA-PACIFIC TOWING CORPORATION, a corporation, RAINIER MANUFACTURING CO., a corporation, and BERT L. COLE, as Commissioner of Public Lands of the State of Washington, and THE STATE OF WASHINGTON,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented for Review	2
Constitutional Provisions Involved	3
Statement of the Case	3
Federal Questions Raised	5
1. Federal Questions Raised by Complaints	5
2. Federal Questions Raised by Decisions	5
Argument in Support of Writ	5
Conclusion	9
Appendices:	
Appendix A	A-1
Appendix B	A-14

TABLES OF AUTHORITY

Table of Cases

Anderson-Tully Co. v. Murphee, 153 F.2d 874 (8th Cir., 1946) 7

Borax Consolidated Ltd. v. City of Los Angeles, 296 U.S. 10 ..... 2-3, 5, 6

Broad River Power Company v. South Carolina, 281 U.S. 537 8

Chicago, B & Q R. Co. v. Chicago, 166 U.S. 226 6

Demorest v. City Bank Farmers Trust Co., 321 U.S. 36 8

Fox River Paper Co. v. Railroad Commission, 274 U.S. 651 6

Hughes v. State of Washington, 389 U.S. 290 ..... 2, 4, 5, 8

Page

Narrows Realty Co. v. State of Washington, 52 Wn.2d 843, 329 P.2d 836 (1958) 8

Pollard v. Hagan, 3 How. 210 6

Scurry v. Jones, 4 Wash. 468, 30 Pac. 726 (1892) 8

Shively v. Bowlby, 152 U.S. 1 6

State ex rel. McKenzie, 11 Wash. 227, 39 Pac. 684 7

United States v. Grand River Dam Authority, 363 U.S. 229 6

United States v. Oregon, 295 U.S. 1 6

Washougal Transp. Co. v. Dalles, Etc., Nav. Co., 27 Wash. 490, 68 Pac. 74 (1902) 5, 7, 8

Constitutional Provisions

United States Constitution, Amendment Fourteen 2, 6, 7, 9

United States Constitution, Amendment Fourteen, Section 1 3

Washington State Constitution, Article XVII, Sec. 1 ..... 3, 7

Washington State Constitution, Article XVII, Sec. 2 ..... 2, 3, 4, 7, 9

Statutes

28 U.S.C. §1257(3) 2

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SMITH TUG & BARGE CO., a corporation, and J. B. LANPHER, BIG CREEK & TELOCASET CO., an Oregon corporation, and MARIBETH W. COLLINS, ELMER R. GOUDY and ALTON L. COLLINS, personal representatives of the Estate of TRUMAN W. COLLINS,
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OPINIONS BELOW

The opinion of the Supreme Court of Washington is reported at 78 W.D.2d 1000 and appears at Appendix A, *infra*, pp. A-1 through A-13. The memorandum opinion of the Superior Court of the State of Washington in and for the County of Cowlitz rendered May 15, 1968, is unreported and appears as Appendix B, *infra*, pp. A-14 through A-17.

JURISDICTION

This petition for certiorari was filed less than 90 days from March 11, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3). The order or judgment of the Supreme Court of the State of Washington was entered on March 11, 1971. See Appendix A, p. A-3, *infra*.

QUESTIONS PRESENTED FOR REVIEW

Petitioners instituted a declaratory judgment action in the Superior Court of Cowlitz County, State of Washington seeking to quiet title to submerged lands lying under and along two navigable rivers in the State of Washington, said lands having been acquired by federal patents issued prior to statehood. The questions thereby arising are:

1. Whether the decision of the Supreme Court of the State of Washington in (a) reversing the lower court judgment which granted the relief prayed for by petitioners and (b) remanding the case to the Superior Court for entry of a judgment which provides that Respondent herein and its lessees are entitled to the beds of the navigable rivers which lie between the original meander lines in the rivers and the present line of ordinary high water to which the rivers have now eroded constitutes a taking of Petitioners' property rights derived from federal patents issued prior to statehood contrary to the due process clause of the Fourteenth Amendment, in light of the title disclaimer in Article XVII, Sec. 2, of the Washington State Constitution.

2. Whether the decision of the Supreme Court of the State of Washington is in conflict with opinions of this Court such as *Hughes v. State of Washington*, 389 U.S. 290, and *Borax Consolidated Ltd. v. City of Los Angeles*,

296 U.S. 10, holding that the extent of a grant under federal patent, that is, as to the limit of the land conveyed, on the boundary between upland and the tideland is necessarily a federal question, rather than a question of state law.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States, Amendment Fourteen, Sec. 1: (U.S.C.A., Constitution, Amend. 6-14, p. 288)

> ". . . nor shall any state deprive any person of life, liberty or property without due process of law. . . ."

Article XVII, Sec. 1, Washington State Constitution (RCW, Articles XII to End, p. 53):

> "§1. *Declaration of State Ownership.* The state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes: Provided, that this section shall not be construed so as to debar any person from asserting his claim to vested rights in the courts of the state."

Article XVII, Sec. 2, Washington State Constitution (RCW, Articles XII to End, p. 60):

> "§2. *Disclaimer of Certain Lands.* The state of Washington disclaims all title in and claim to all tide, swamp and overflowed lands, patented by the United States. . ."

STATEMENT OF THE CASE

The facts relevant to the questions presented by this petition are uncontroverted and, therefore, may be introduced to the Court in a summary fashion.

The predecessors in interest of Petitioners Lanpher, Col-

lins and Big Creek and Telocaset Company acquired uplands along the Columbia and Cowlitz Rivers in the State of Washington under patents issued by the United States Government prior to statehood (1889). Government surveys were conducted in 1857 and 1863 which established meander lines at the confluence of the two rivers and along the properties here involved. The surveyed meander lines substantially conformed to the line of ordinary high water then existing. At various places along the property owned by Petitioners there occurred over many years a gradual erosion of the river banks with the result that the line of ordinary high water once co-existent with the meander line has shifted inland leaving the meander line several hundred feet out in the navigable streams. The submerged river beds lying between the original government meander line and the present line of ordinary high water are the subject matter of this petition.

The petitioning land owners leased said submerged lands to petitioner Smith Tug and Barge Co. and Respondent State of Washington, also claiming said lands, leased the same to other parties.

The State Trial Court quieted title to said submerged lands in favor of Petitioners on the basis of the State of Washington's disclaimer in Washington Constitution Article XVII, Sec. 2. Accretions were involved in the case but are conceded by all parties to be controlled by *Hughes v. State of Washington*, 389 U.S. 290. The Supreme Court of Washington reversed that portion of the trial court's judgment with respect to submerged river-bed lands, depriving Petitioners of such lands lying riverward of the line of ordinary high water.

FEDERAL QUESTIONS RAISED

1. Federal Questions Raised by Complaints

Paragraph 6 of the original complaint for declaratory judgment alleged that, prior to statehood, lands were surveyed, meander lines established and federal patents issued to the real property in question. The same allegation appears in substance in Paragraph 5 of Intervenor's Complaint. The basic question throughout this case has been the proper construction of the extent of Petitioner's federal patent grants which this court has characterized as a federal question in *Hughes v. State of Washington*, 389 U.S. 290, and *Borax Consolidated v. City of Los Angeles*, 296 U.S. 10.

2. Federal Questions Raised by Decisions

Petitioners claim that the March 11, 1971 decision of the Supreme Court of the State of Washington which overruled its long established line of cases culminating in *Washougal Transp. Co. v. Dalles, Etc. Nav. Co.*, 27 Wash. 490, 68 Pac. 74 (1902), which had been the law for 69 years, constituted such an unpredictable and sudden change in the state law as to present a due process federal question for this court. See concurring opinion of Mr. Justice Stewart in *Hughes v. State of Washington, supra.*

ARGUMENT IN SUPPORT OF WRIT

1. The decision of the Washington State Supreme Court divests federal patentees of property rights conveyed by the United States prior to statehood, curtails the nature of title to realty that the United States may convey in the future and conflicts with numerous decisions of this court.

In Washington, as in other Western states, "the Federal

government was the initial proprietor . . . and any claim by a State or by others must derive from this Federal title." *United States v. Grand River Dam Authority*, 363 U.S. 229, 235; *Shively v. Bowlby*, 152 U.S. 1, 50-51.

The determination of which lands were thus transferred to Washington and which were retained by the federal government clearly cannot be controlled by Washington law. *United States v. Oregon*, 295 U.S. 1. The Washington Supreme Court erred in concluding that state law superseded the federal law as the law controlling Petitioners' rights under federal patent. After statehood, "the question . . . as to the limit of the land conveyed [by federal patent] or the boundary between the upland and the tideland is necessarily a federal question." *Borax Consolidated v. Los Angeles*, 296 U.S. 10, 22.

2. The decision of the Washington State Supreme Court violates the due process clause of the Fourteenth Amendment to the United States Constitution.

a. Quieting title to the submerged lands in question constitutes a taking of Petitioners' property without compensation. This court has long recognized that such a taking violates the due process clause of the Fourteenth Amendment. *Chicago, B & Q R. Co. v. Chicago*, 166 U.S. 226.

Upon statehood, title to tidelands and other submerged lands was transferred to the State of Washington by virtue of its constitutional right to stand on an equal footing with the original states, *Pollard v. Hagan*, 3 How. 210; *Shively v. Bowlby*, 152 U.S. 1. Thus, upon admission, the State had absolute power of disposition over such lands. *Fox River Paper Co. v. Railroad Commission*, 274 U.S. 651. The State's constitutional disclaimer conveyed title to sub-

merged lands to the riparian proprietor holding under a federal patent issued prior to statehood. The Supreme Court of Washington has held that the disclaimer in Article XVII, Sec. 2 is as broad as the claim of title in Article XVII, Sec. 1. *State ex rel. McKenzie*, 11 Wash. 227, 39 Pac. 684.

In *Washougal Transp. Co. v. Dalles, Etc. Nav. Co.*, 27 Wash. 490, 68 Pac. 74 (1902), the appellant was the successor in interest to a patentee of Columbia River uplands under a patent pre-dating statehood. The Supreme Court of Washington held that the effect of the disclaimer was to vest in the patentee all tide lands lying within the meander lines.

Anderson-Tully Co. v. Murphee, 153 F.2d 874 (8th Cir., 1946), is strikingly similar to the instant case. There the court held that the position of the State of Arkansas in claiming the right of disposition over an island in a navigable stream was in violation of the due process clause of the Fourteenth Amendment where the state had previously, by statutory grant, vested title in the upland owner. The State, in the instant case, claims the right of disposition over lands which were clearly granted away upon adoption of the Washington State Constitution. To uphold the position of the State of Washington, would unconstitutionally deprive Petitioners of their property without compensation.

(b) The action of the Supreme Court of the State of Washington, in overruling its prior decisions and embarking on a new interpretation of Section 2, Article XVII of the Washington State Constitution and applying that new ruling retroactively to the property of Petitioners constitutes such a sudden and unpredictable change in State law as to work an unconstitutional deprivation of Petition-

ers' property rights without compensation. This court has previously recognized that a sudden change in State law, whether by the legislature or the judiciary, where it deprives a person of property rights which are deemed to have vested as a result of prior state law, can constitute an unconstitutional deprivation of property without compensation. *Broad River Power Company v. South Carolina*, 281 U.S. 537. See also *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36, 42-43, and the concurring opinion of Mr. Justice Stewart in *Hughes v. State of Washington*, 389 U.S. 290, 296-298.

The Supreme Court of the State of Washington sought to distinguish and finally overruled *Washougal, supra*, finding that case inconsistent with its view of what the law should be. The court based its opinion, in part, on the ground that "it is illogical to assume that the framers of the State Constitution intended an interpretation of Constitution Article XVII, Sections 1-2, that would potentially deprive the state of such a necessary thing as ownership of the beds of its navigable rivers." (Appendix A, page ....). This statement is startling in view of the fact that the writer of the opinion in *Scurry v. Jones*, 4 Wash. 468, 30 Pac. 726 (1892), (the cornerstone of the law in this area in the State of Washington) was the President of the Constitutional Convention which had adopted the Washington State Constitution only three years previouslyy. *Narrows Realty Co. v. State of Washington*, 52 Wn.2d 843, 329 P.2d 836 (1958).

The Law in the State of Washington with respect to the ownership of submerged lands in upland owners such as Petitioners was firmly established and in accordance with the intent of the framers of the Washington State Consti-

tution and with the clear language of Article XVII, Section 2, prior to the decision of the Washington Supreme Court in the instant case. That decision worked such a sudden or unpredictable change in State law as to deprive Petitioners of their property rights without compensation in violation of the due process clause of the Fourteenth Amendment to the United States Constitution.

CONCLUSION

For these reasons a Writ of Certiorari should issue to review the judgment and opinion of the Washington State Supreme Court.

Respectfully submitted,

JUDSON T. KLINGBERG
Of Attorneys for Petitioners

APPENDIX A

En Banc.

No. 41225

SMITH TUG & BARGE CO., *et al., Respondents,*

v.

COLUMBIA-PACIFIC TOWING CORPORATION and BERT L. COLE, *as Commissioner of Public Lands, Appellants.*

MARIBETH W. COLLINS *et al., Respondents,*

v.

RAINIER MANUFACTURING CO., and BERT L. COLE, *as Commissioner of Public Lands, Appellants.*

[1] Boundaries — Navigable Stream — Federal Patents—Constitutional Disclaimer of Ownership. Const. art. 17, § 2, under which the state disclaims all title to overflowed lands patented by the United States, does not operate in disregard of *erosion* to permanently fix boundaries of federal patents abutting navigable streams, issued prior to statehood, at the ordinary high water or meander line existing at the time of the patent (overruling *Washougal & LaCamas Transp. Co. v. Dalles, Portland & Astoria Nav. Co.*, 27 Wash. 490, insofar as it is inconsistent).

[2] Boundaries—Navigable Stream—Meander Line. Meander lines on navigable streams are not boundaries of federal lands patented prior to statehood, but were run for the purpose of defining the sinuosities of a river's banks and as a means of ascertaining the quantity of land. The watercourse itself provides the actual boundary.

[3] Boundaries — Navigable Stream — Federal Patents—Changes in Course of River. The line of ordinary high water is the boundary of lands bordering a navigable stream which lands were patented by the United

States Government prior to statehood and, when the course of the river is changed by accretion or erosion, the owner's water boundary shifts with the natural and gradual moving course of the river. One may lose his land by gradual natural erosion and he is entitled to the addition caused by natural accretion.

Appeal from a judgment of the Superior Court for Cowlitz County, Nos. 30520, 31066, Frank L. Price, J., entered March 21, 1969. *Affirmed in part; reversed in part.*

Cross actions to quiet title to realty and to determine rights under lease agreements. Defendants appeal from a judgment in favor of the plaintiffs.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

SMITH TUG & BARGE CO., a corporation, and J. B. LANPHER, BIG CREEK & TELOCASET CO., an Oregon corporation, and MARIBETH W. COLLINS, ELMER R. GOUDY and ALTON L. COLLINS, personal representatives of the estate of TRUMAN W. COLLINS,

Respondents,

v.

COLUMBIA-PACIFIC TOWING CORPORATION, a corporation,

Appellant,

BERT L. COLE, as Commissioner of Public Lands of the State of Washington,

Appellant.

MARIBETH W. COLLINS, ELMER R. GOUDY and ALTON L. COLLINS, as personal representatives of the estate of TRUMAN W. COLLINS,

Respondents,

v.

RAINIER MANUFACTURING CO., a corporation,

Appellant,

BERT L. COLE, as Commissioner of Public Lands of the State of Washington,

Appellant.

No. 41225
En Banc

Filed
March 11,
1971

STAFFORD, J.—The predecessors of respondent upland owners acquired their interest in the realty here in question from the United States government. The property as originally patented and meandered abutted the navigable waters of the Columbia and Cowlitz rivers, at or near their confluence.

The government meander line, established by surveys in 1857 and 1863, substantially conformed to the line of ordinary high water as it existed on those dates. However, the location of the line of ordinary high water at the time of statehood is unknown.

During the intervening years accretions have occurred along both navigable rivers causing the line of ordinary high water to shift riverward so that the meander line is now situated a considerable distance landward of the line of ordinary high water. On the other hand, a reverse action has occurred at other points where the flow of the two navigable rivers has gradually eroded their banks. As a result, the line of ordinary high water, once coextensive with the meander line, has shifted inland thereof leaving the meander line several hundred feet out in the navigable stream in many areas. In the latter areas the lands lying betweeen the meander line and the present line of ordinary high water are now submerged and have become a part of the bed of the navigable rivers. The last mentioned land is the subject of dispute in this case.

Respondent upland owners conveyed to respondent lessees the right to erect, on the submerged land (*i.e.*, the riverbed) in front of their uplands, certain piling, dolphins, booms and other appliances for the purpose of booming, rafting and sorting logs. The appellant Commissioner of Public Lands, acting for the State of Washington, leased the same part of the riverbed to appellant lessees.

Respondents initiated this action for a declaratory judgment seeking to quiet title of the upland owners to the disputed riverbed and to have the rights of their lessees declared superior. Appellants counterclaimed asking that the

state be declared the lawful owner of the riverbed and that the leases issued under its claim of ownership be declared valid.

The trial court quieted respondents' title to the riverbed lying between the meander line, as it is now situated out in the navigable river, and the present line of ordinary high water. The trial court also held that all accretions which occurred riverward of the meander line belong to the respondents.

Appellants have not challenged the trial court's judgment pertaining to the accreted lands. However, they have assigned error to that portion of the judgment which quiets respondents' title to those submerged lands which comprise a part of the navigable riverbed.

Before examining the basis for the conflicting claims, we shall first advert to the general rules which control in the cases of navigable rivers. It is well recognized that when federal patents border on a navigable river and the course of the river is changed by accretion or gradual erosion, the owner's water boundary shifts with the natural and gradual moving of the course of the river. *Ghione v. State,* 26 Wn. 2d 635, 175 P.2d 955 (1946); *Jeffries v. East Omaha Land Co.,* 134 U.S. 178, 33 L. Ed. 872, 10 S. Ct. 518 (1890); *Arkansas v. Tennessee,* 246 U.S. 158, 62 L. Ed. 638, 38 S. Ct. 301 (1918); 4 H. Tiffany, The Law of Real Property, §§ 1219-20 (3d ed. 1939, Supp. 1970). In short, every patentee whose land is bounded by a navigable river is subject to loss of his realty by gradual erosion and addition to his land by accretion. *New Orleans v. United States,* 35 U.S. (10 Pet.) 660, 716, 9 L.Ed. 573 (1836). As indicated in *Jefferis v. East Omaha Land Co., supra,* at 195,

the rule is as much applicable to the government as it is to private individuals.

Respondents do not question the general principle just stated, but they argue that it is only partially applicable here. They readily accept the *shifting boundary* concept insofar as it grants them accretions to patented lands bounded by navigable rivers. However, they reject it insofar as it causes them to lose patented land by gradual erosion of the river's bank. They assert that this anomaly results from the constitutional disclaimer contained in article 17, section 2 of the Washington State Constitution.[1]

Respondents acknowledge that the state claims ownership "to the beds and shores of all navigable waters in the state . . . up to and including the line of ordinary high water within the banks of all navigable rivers . . ." Const. art. 17, § 1. They argue, however, that insofar as erosion is concerned, the constitutional "disclaimer" *permanently fixed* the boundaries of federal patents, abutting navigable waters, at the line of ordinary high water or at the meander line, whichever was the farthest waterward. Essentially their argument is based on a combination of three cases and their legal progeny: *Scurry v. Jones*, 4 Wash. 468, 30 P. 726 (1892); *Cogswell v. Forrest*, 14 Wash. 1, 43 P. 1098 (1896); and *Washougal & LaCamas Transp. Co. v. Dalles, Portland & Astoria Nav. Co.*, 27 Wash. 490, 68 P. 74 (1902).

Scurry was the first case to provide that all lands within the calls of a federal patent, lying waterward of the line of ordinary high tide, belong to the patentee if the patent

1. "The State of Washington disclaims all title in and claim to all tide, swamp and overflowed lands, patented by the United States . . ." Const. art. 17, §2.

was issued prior to statehood. Despite Const. art. 17, § 1, which establishes the state's claim to ownership of the beds and shores of all navigable waters up to and including the line of ordinary high tide in waters where the tide ebbs and flows, it was held that the "disclaimer" clause of Const. art. 17, § 2 prevails when the calls of a patent extend waterward of the line of ordinary high tide.

It must be noted, however, that *Scurry* did not discuss the second portion of Const. art. 17, §1 in which the state claims ownership of "the beds . . . of all navigable waters . . . up to and including the line of ordinary high water *within the banks of all navigable rivers* . . ." (Italics ours.) The case dealt solely with patented lands located on a *bay*. The importance of the distinction is evident. With the exception of *Washougal*, the application of *Scurry* has been limited to cases which have involved boundaries to patented lands bordering the Puget Sound,[2] bays,[3] lakes,[4] or waters treated as a bay.[5]

Cogswell v. Forrest, supra, was the first case to crystalize respondents' theory. *Cogswell* extended the *Scurry* decision by holding that if lands patented prior to statehood border navigable waters, a meander line located waterward of the line of ordinary high water is a *fixed* boundary. The land in *Cogswell* was located at the mouth of

2. *Kneeland v. Korter*, 40 Wash. 359, 82 P. 608 (1905); *Narrows Realty Co. v. State*, 52 Wn.2d 843, 329 P.2d 836 (1958).

3. *State v. Board of Tide Land Appraisers of Whatcom County*, 5 Wash. 425, 32 P. 97 (1892); *State ex rel. McKenzie v. Forrest*, 11 Wash. 227, 39 P. 684 (1895); *Anderson v. Olson*, 77 W.D.2d 241, 461 P.2d 343 (1969).

4. *Brace & Hergert Mill Co. v. State*, 49 Wash. 326, 95 P. 278 (1908); *Bleakley v. Lake Wash. Mill Co.*, 65 Wash. 215, 118 P. 5 (1911); *Hewitt-Lea Lumber Co. v. King County*, 113 Wash. 431, 194 P. 377 (1920).

5. *Cogswell v. Forrest*, 14 Wash. 1, 43 P. 1098 (1896).

the Puyallup River virtually on the *bay*. The sole authority for the court's holding was *Scurry*, itself a "bay" case.

With the exception of *Washougal*, we have limited the holding of *Cogswell* to patented lands which border meandered navigable waters of Puget Sound,[6] or of lakes.[7] In light of respondents' theory, the historical limitation of *Cogswell's* authority assumes an importance similar to our limited use of *Scurry*.

Washougal, the last of the triad, is presented by respondents as an extension of *Scurry* and *Cogswell*. Respondents suggest the decision in *Washougal* supports their contention that lands patented prior to statehood, which border on navigable meandered *rivers*, have water boundaries that are *fixed* against *erosion* of the patentee's boundary. *Washougal* is the only case in which we have discussed the "disclaimer clause"[8] in relation to the boundaries of patented lands bordering on meandered *navigable rivers*.[9]

In *Washougal* the patented lands were bounded by a navigable river. The meander line was *above* the line of

6. *Kneeland v. Korter, supra.*

7. *Brace & Hergert Mill Co. v. State, supra; Bleakley v. Lake Wash. Mill Co., supra; Hewitt-Lea Lumber Co. v. King County, supra.*

8. Const. art. 17, §2.

9. Respondents have cited *Wilson v. Prickett*, 79 Wash. 89, 139 P. 754 (1914), which involved a nonnavigable, nonmeandered river, thus, it is not in point. Respondents have cited other cases equally inapplicable to the boundaries of rivers. *Van Siclen v. Muir*, 46 Wash. 38, 89 P. 188 (1907); *King County v. Hagen*, 30 Wn.2d 847, 194 P.2d 357 (1948); and *Mercer Island Beach Club v. Pugh*, 53 Wn.2d 450, 334 P.2d 534 (1959), all refer to lakes. *Stockwell v. Gibbons*, 58 Wn.2d 391, 363 P. 2d 111 (1961), refers to a bay. *Washington Boom Co. v. Chehalis Boom Co.*, 90 Wash. 350, 156 P. 24 (1916), is concerned with an unmeandered salt water slough. *Hughes v. State*, 67 Wn.2d 799, 410 P.2d 20 (1966), *rev'd*, 389 U.S. 290, 19 L. Ed. 2d 530, 88 S. Ct. 438 (1967), referred to Pacific Ocean beaches.

ordinary high water. We held that the line of ordinary high water, rather than the meander line, was the boundary. In so doing, we explained that our adherence to the general rule was not necessarily inconsistent with either *Scurry* or *Cogswell*. Each was distinguished because the meander line lay *below* the line of ordinary high water thus bringing into play the "disclaimer clause" and a different result.

It is important to note, however, that *Washougal* did not apply the "disclaimer clause" to the facts at hand. It did not even suggest that the rule of *Scurry* and *Cogswell* should be extended to deprive the state of its claim to ownership in the beds of *navigable rivers*. At best, it cited Const. art 17, § 2 to clarify and distinguish *Scurry* and *Cogswell*.

The *Washougal* case is seriously circumscribed by its own peculiar fact pattern. The lines of ordinary high and low water were practically coincident, differing only with the rise and fall of the river on a vertical bank. Thus, no shoreland existed other than that which was created in part by natural erosion of the riverbank landward of the original line of ordinary high water and in part by accretions artificially created by debris caught and held by piling driven into the riverbed during construction of a wharf, by predecessors in interest of the upland owners.

The basic question was whether the state owned any shorelands thus created. Under these special facts; we held:

> *It cannot be that shorelands created by the erosion of the banks of a stream within the boundaries of a private claim inure to the benefit of the state; nor*

> *can the state claim, as shorelands, fills in a river caused by artificial means.*

Washougal, 27 Wash. at 499 (Italics ours.) Nevertheless, we also held that even though the state did not own the artificially created land it had the power to remove it as a nuisance if it interfered with navigation.[10]

Taken at face value, the italicized portion of the foregoing quotation is contrary to the generally accepted rules of accretion and erosion.[11] In fact, it is impossible to align the rationale of *Washougal*, which involves only *one* riverbank, with the normal rule which accounts for river action on *two* banks.

At best, *Washougal* is obscure. The case devotes only the passage quoted to the accretion-erosion problem, cites no authority, and gives the issue none of the consideration ordinarily expected of a case which, according to respondents, apparently set Washington law on a course different from that followed by most other states.[12] Significantly we have never cited it again for the proposition that lands patented prior to statehood, bordering on meandered navigable *rivers*, have water boundaries that are *fixed against erosion*.

Respondents have attempted to superimpose on navi-

10. "It is generally agreed that the riparian owner will not be permitted to increase *his estate himself* by creating an artificial condition for the purpose of effecting such an increase . . ." (Italics ours.) 56 Am. Jur. *Waters* §486, p. 899 (1947).

11. The leading accretion-erosion cases state that when a boundary line is the line of any watercourse, gradual shifting of that line by either erosion or accretion results in a shift of the boundary line: *Jefferis v. East Omaha Land Co.*, 134 U.S. 178, 33 L. Ed. 872, 10 S. Ct. 518 (1890); *Arkansas v. Tennessee*, 246 U.S. 158, 62 L. Ed. 638, 38 S. Ct. 301 (1918); *Ghione v. State*, 26 Wn.2d 635, 175 P.2d 955 (1946).

12. Corker, *Where Does the Beach Begin*, 42 Wash. L. Rev. 33, 82-83 (1966).

gable meandered rivers legal principles established by this court to cope with boundary problems peculiar to navigable lakes and bays, the sound and the ocean. However, the forces of nature and the legal problems involved are quite dissimilar.

Whereas the shores of navigable lakes, bays and the Puget Sound are subjected to some accretion and erosion, it is the very nature of rivers to shift and change their banks. Furthermore, rules of law which logically apply to the single bank and open shores of an ocean, sound or navigable bays and lakes, wherein the rights of the landowners on opposite shores seldom conflict, are completely irreconcilable with problems faced by owners of land bounded by navigable rivers. Rivers are confined to two immediately adjacent banks *both of which* are subject to constant change by accretion and erosion.

The incongruity of respondents' position is readily apparent if one considers the practical problem of two contesting patentees located on opposite banks of a meandered, navigable river. Followed to its logical conclusion, both parties could claim the same land if normally expected accretion and erosion take place. One would base his title on the accretions to his uplands (*i.e.*, the *shifting boundary* rule acknowledged, in such situation, by both parties). The other would claim the same land because it falls within the meander line located riverward of the line of high water (*i.e.*, respondents' theory that such a boundary is *fixed* thus preventing loss by erosion). Furthermore, in that "no man's land" created by use of the two incompatible rules, the state's ownership of the bed of the navigable river would be left in a state of continual uncertainty.

It is illogical to assume that the framers of the state constitution intended an interpretation of Const. art 17, §§ 1-2 that would potentially deprive the state of such a necessary thing as ownership of the beds of its navigable rivers.

A reasonable result can be reached only by applying the generally recognized rules pertaining to accretion and erosion of navigable rivers to problems peculiarly concerned with the navigable rivers of this state. First: meander lines are not boundaries of tracts of federal lands patented prior to statehood. Insofar as such lands border on navigable rivers, meander lines were run for the purpose of defining the sinuosities of the banks of the river, and as a means of ascertaining the quantity of land. The watercourse itself, however, provides the actual boundary. *Ghion v. State*, 26 Wn.2d 635, 175 P.2d 955 (1946); *Railroad Co. v. Schurmeir*, 74 U.S. (7 Wall.) 272, 19 L. Ed. 74 (1868); 12 Am. Jur.2d, *Boundaries*, §29, page 569, (1964, Supp. 1970). Second: the line of ordinary high water is the boundary of federal lands patented prior to statehood, if they abut navigable rivers. Third: such boundary shifts with the natural and gradual erosion and accretion of the river. Although one may lose his land by gradual natural erosion, he is entitled to the addition caused by natural accretion. *Ghione v. State, supra.* Insofar as *Washougal & LaCamas Transp. Co. v. Dallas, Portland & Astoria Nav. Co.*, 27 Wash. 490, 68 P 74 (1902), is inconsistent with these principles, it is overruled.

We withhold any expression of opinion as to the effect of a change in water boundary between upland and tide or shoreland *after* the state has surveyed the tide or shore

land and has sold or otherwise conveyed it. That matter is not before us.

The judgment of the trial court is affirmed insofar as it provides that the respondent landowners and their lessees are entitled to the accreted lands lying between the present line of ordinary high water and the original meander line to the landward. Insofar as the submerged lands are concerned, however, the cause is remanded for entry of a judgment which provides that appellant State of Washington and its lessees are entitled to the beds of the navigable rivers which lie between the original meander lines in the rivers and the present lines of ordinary high water to which the rivers have now eroded.

We concur:

Hamilton, C.J.	Hale, J.
Finley, J.	Neill, J.
Rosselini, J.	McGovern, J.
Hunter, J.	

APPENDIX B

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, IN AND FOR THE COUNTY OF COWLITZ

SMITH TUG & BARGE COMPANY, a corporation, *et al*, *Plaintiffs*, MARIBETH W. COLLINS, *et al*, *Interveners*, v. COLUMBIA-PACIFIC TOWING CORPORATION, a corporation, *et al*, *Defendants*.	No. 30520 MEMORANDUM OPINION
and	
MARIBETH W. COLLINS, *et al*, *Plaintiffs*, v. RAINIER MANUFACTURING COMPANY, a corporation, *et al*, *Defendants*.	No. 31076

The parties have stipulated as to the facts to be presented to the court. Plaintiffs and intervenors derived title to certain government lots and portions of lots and donation land claims located near the confluence of the Columbia and Cowlitz rivers through patents issued by the United States prior to statehood. The meander lines established by the government surveys of 1857 and 1863 of the property in question conformed to the line of ordinary high water mark then existing. The banks of the Columbia and Cowlitz rivers have eroded away so that the present water line in front of said property is now as much as several hundred feet landward of the meander lines.

Plaintiffs and intervenors content they are owners of the property described including the portions submerged in said rivers. Defendants contend that the state is owner of all submerged lands lying in front of the present high water line of the subject property.

The issue for the court is the effect of Section 2, Article 17 of the Washington State Constitution which provides as follows:

> "The state of Washington disclaims all title in and claim to all tide, swamp and overflowed lands, patented by the United States: Provided, the same is not impeached for fraud."

> "These cases (referring to *Scurry v Jones*, 4 Wash. 468 and *Cogswell v Forrest*, 14 Wash. 1) hold that the state of Washington, by the disclaimer in its constitution (Section 2, article 17), waived its right to assert title to such of the tide lands as lay above the meander line run by the government surveyors as the boundary of uplands which had been conveyed by patent from the government of the United States prior to the admission of the state into the Union. But however illogical it may seemingly be to hold that the meander line marks the boundary of a government grant when it runs below the line of ordinary high-water mark, but does not so mark it when it runs above that line, it is plain that the distinction rests upon widely differing principles. The title to all tide and shore lands passed to the state at the time of its admission into the Union. From thenceforward the state had the sole and absolute right and power of disposition over such lands, and it could, either in its fundamental law, or by statutory enactment, provide for their disposition. When, therefore, by its constitution, it disclaimed 'all title in and claim to all tide, swamp, and overflowed lands patented by the United States,' it was within the power of this court to determine the effect of the disclaimer; and the court could very properly hold that its effect was to vest title in the upland owner of all tide lands lying within

the meander lines described in the calls of his patent." *Washougal Transp. Co. v. Dalles, etc., Nav. Co.*, 27 Wash. 490 (1902)

"Meander lines can be made boundaries if state law makes them so and they are seaward of the high tide line that would otherwise be the boundary. In Washington, a meander line is a boundary if seaward of the line of ordinary high tide, and title extending to the meander line was initiated prior to statehood. *Narrows Realty Co. v State*, 52 Wn 2d 843. The decision results from an early construction of Article XVII, Section 2 of the Washington Constitution validating federal patents to tideland prior to statehood. Illogical, the rule treats as patented that which the United States law determines was not covered by patent, but it is a federally permissible illogic and well settled." 42 W.R. 55

"The common grantor to all parties litigant acquired title to Lot 1 from a government land patent issued in 1862, some twenty seven years prior to the admission of the state of Washington to the Union. Under Article 17, section 2, of the Washington State Constitution, such a land patent conveys to the patentee title to all of the property above the line of ordinary high tide or the government meander line, whichever is farther seaward." *Stockwell v Gibbons*, 58 Wn 2d 391 (1961)

The writer of the *Scurry v. Jones* opinion, Judge Hoyt, was president of the Constitutional convention which adopted the constitution only three years previously. *Narrows Realty v. State*, 52 Wn.(2d) 843.

Where a particular construction has been generally accepted as correct, and especially when this has occurred contemporaneously with the adoption of the constitution, and by those who had opportunity to understand the intention of the instrument, it is not to be denied that a strong presumption exists that the construction rightly interprets the intention. 1 Cooley's Constitutional Limita-

tions (8th ed) 144 (1927), cited *In Re Bartz*, 47 Wash. (2d) 161.

Defendants contend that the United States Supreme Court, in *State v. Hughes*, 19 L.Ed.2d 530, 88 S. Ct. 438, has in effect overruled the line of Washington cases applying the disclaimer provision. Applying the disclaimer provision where the meander line is below the high water mark and applying the shifting boundary rule where the meander line is above the high water mark are based on two entirely different legal principles. See *Washougal, supra.*

> "The nature and extent of the rights of the State and of riparian owners of navigable waters within the State and to the soil beneath are matters of State law to be determined by the statutes and judicial decisions of the state (citing cases). If the state chooses to resign to the riparian proprietor, sovereign rights over navigable rivers which it acquired upon assuming statehood, it is not for others to raise objections." *Fox River Paper Company v. Railroad Commission*, 274 US 651, 71 L.Ed. 1279, 47 S.Ct. 669 (1926).

In none of the Washington cases has the Supreme Court defeated the disclaimer provision by applying the shifting boundary rule. The Washougal case indicates that considerable erosion occurred subsequent ot the patent being issued.

It is this Court's opinion, that the meander line of the plaintiffs' and intervenors' property, where below the line of ordinary high water mark as it exists at this time, is the boundary of their property.

dated this 15 day of May, 1968.

s/ FRANK L. PRICE
Judge

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IN THE

SUPREME COURT

OF THE

UNITED STATES

March Term, 1971

No. 1798

SMITH TUG & BARGE CO., a corporation, and J. B. LANPHER, BIG CREEK & TELOCASET CO., an Oregon corporation, and MARIBETH W. COLLINS, ELMER R. GOUDY and ALTON L. COLLINS, personal representatives of the Estate of TRUMAN W. COLLINS,

Petitioners,

v.

COLUMBIA-PACIFIC TOWING CORPORATION, a corporation, RAINIER MANUFACTURING CO., a corporation, and BERT L. COLE, as commissioner of Public Lands of the State of Washington, and THE STATE OF WASHINGTON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR RESPONDENT IN OPPOSITION

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STATE PRINTING PLANT OLYMPIA, WASHINGTON

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SUBJECT INDEX

	Page
Questions Presented for Review	1
Statement of the Case	2
Argument in Opposition	2
Conclusion	7
Appendix	A-1

TABLES OF AUTHORITY

Table of Cases

Anderson-Tully Co. v. Murphee, 153 F.2d 874 (8th Cir. 1946)	3, 6
Baer v. Moran Bros. Co., 14 S. Ct. 823, 153 U.S. 287, 38 L. Ed. 718 (1893)	3
Borax v. City of Los Angeles, 56 S. Ct. 23, 296 U.S. 10, 80 L. Ed. 9 (1935)	3, 4
Broad River Power Co. v. South Carolina, 50 S. Ct. 401, 281 U.S. 537, 74 L. Ed. 1023 (1929)	5
Demorest v. City Bank Co., 64 S. Ct. 384, 321 U.S. 36, 88 L. Ed. 526 (1944)	5
Ellis v. Dixon, 75 S. Ct. 850, 349 U.S. 438, 99 L. Ed. 1231, rehearing denied, 76 S. Ct. 37, 350 U.S. 855, 100 L. Ed. 759	4
Fox River Paper Co. v. Railroad Commission, 47 S. Ct. 669, 274 U.S. 651, 71 L. Ed. 1279 (1926)	4
George v. Pierce County, 111 Wash. 495, 191 P. 406 (1920)	6
Ghione v. State, 26 Wn.2d 635, 175 P.2d 955 (1946)	6
Glenn v. Wagner, 199 Wash. 160, 90 P.2d 734 (1939)	6
Hill v. Newell, 86 Wash. 227, 149 P. 951 (1915)	6
Hogue v. Bourgois, 71 N.W.2d 47, 54 A.2d 833 (1955)	3

Table of Cases—Continued

	Page
Mann v. Tacoma Land Co., 14 S. Ct. 820, 153 U.S. 273, 38 L. Ed. 714 (1893)	3
Newell v. Loeb, 77 Wash. 182, 137 P. 811 (1913)	6
Rue v. Oregon & Washington R. Co., 109 Wash. 436, 186 P. 107 (1920)	6
Shively v. Bowlby, 14 S. Ct. 548, 152 U.S. 1, 38 L. Ed. 31 (1893)	3
United States v. Washington, 294 F.2d 830, cert. denied, 82 S. Ct. 828, 369 U.S. 817, 7 L. Ed. 2d 783 (1962)	3
Washougal Trans. Co. v. Dalles etc. Nav. Co., 27 Wash. 490, 68 P. 74 (1902)	5, 6

Constitutional Provisions

United States Constitution Amendment Fourteen, Section 1	4, 5
Washington State Constitution Article XVII, Sec. 2	3, 4, 5, 6, 7

IN THE

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No. 1798

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED FOR REVIEW

1. Whether or not the decision of the Washington State Supreme Court involved a federal question of substance, and in such event, the decision was not in accord with applicable decisions of the Supreme Court of the United States.

2. Whether or not the decision of the Washington State Supreme Court in construing prior state decisions and the Washington State Constitution violated section 1 of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

The petitioners in the state courts below did not take the position nor present for argument the contention that the question of title to submerged lands lying beyond the line of ordinary high tide was a federal question. On the contrary, petitioners contended that state law controlled in determining title to the submerged area in its brief to the Washington State Supreme Court (Appendix A, p. 1, 3).

Exhibit 12 illustrates that both the Cowlitz River and Carrolls Channel in the Columbia River have gradually shifted in a generally easterly direction with accretions occurring on the westerly side of the Cowlitz River and on Cottonwood Island. This island separates Carrolls Channel from the main channel of the Columbia River. This shifting would deprive the State of Washington ownership of major portions of the bed of both the Cowlitz River and the Columbia River, along with adjacent tidelands, if the contentions of the petitioners had been upheld.

ARGUMENT IN OPPOSITION

I

The State of Washington urges that this case

does not present any substantial federal question relating to the boundary lines of federal patents.

The boundary lines of various patents of the United States between upland and water areas is the line of ordinary high tide or the high water mark in rivers where such line may be located at any such time, *Borax v. City of Los Angeles*, 56 S. Ct. 23, 296 U.S. 10, 80 L. Ed. 9 (1935), *Hughes v. Washington*, 88 S. Ct. 438, 389 U.S. 290, 19 L. Ed. 2d 530 (1967), *United States v. Washington*, 294 F.2d 830, cert. denied, 82 S. Ct. 828, 369 U.S. 817, 7 L. Ed. 2d 783 (1962), *Anderson-Tully Co. v. Murphee*, 153 F.2d 874 (8th Cir., 1946), *Hogue v. Bourgois*, 71 N.W.2d 47, 54 A.2d 633 (N.D. 1955).

Meander lines are not boundary lines of federal patents, *Shively v. Bowlby*, 14 S. Ct. 548, 152 U.S. 1, 38 L. Ed. 31 (1893), *Mann v. Tacoma Land Co.*, 14 S. Ct. 820, 153 U.S. 273, 38 L. Ed. 714 (1893), *Baer v. Moran Bros. Co.*, 14 S. Ct. 823, 153 U.S. 287, 38 L. Ed. 718 (1893). In *Mann v. Tacoma*, *supra*, and *Baer v. Moran Bros. Co.*, *supra*, the government patent was held not to include the tidelands out to the meander line. These decisions further decided that the Washington "disclaimer clause" of Article XVII of the Washington State Constitution did not convey any area out to the meander line because of the fact that the area had not been granted by a federal patent.

The water areas beyond the ordinary high wa-

ter mark have been uniformly held to be controlled by state law. *Borax v. City of Los Angeles, supra, Fox River Paper Co. v. Railroad Commission,* 47 S. Ct. 669, 274 U.S. 651, 71 L. Ed. 1279 (1926).

Petitioners stated in the Washington State Supreme Court that the extent of ownership of tidelands and beds were governed by state law, although federal law declared that the boundary of the patent was the ordinary high water line (see Appendix A, p. 1, 2, 3, 4).

The petitioner did not claim the area between the ordinary high tide line and the meander line lying out in the water was part of the patented area because of any federal rule governing the scope of the patent. On the contrary the sole claim to the area in controversy was based upon an interpretation of the "disclaimer clause" of section 2 of Article XVII of the Constitution of the State of Washington. Questions not raised in state court proceedings are not open to question in a Petition for Writ of Certiorari, *Ellis v. Dixon,* 75 S. Ct. 850, 349 U.S. 458, 99 L. Ed. 1231, rehearing denied, 76 S. Ct. 37, 350 U.S. 855, 100 L. Ed. 759.

II

The decision of the Washington State Supreme Court does not violate the due process laws of the Fourteenth Amendment to the United States Constitution.

The test imposed by this court in determining whether the state court decision is in violation of the provisions of section 1 of the Fourteenth Amendment is fairly state in *Broad River Power Co. v. South Carolina*, 50 S. Ct. 401, 281 U.S. 537, 74 L. Ed. 1023 (1929). That decision indicates this court may inquire whether the state court has sought to evade the constitutional issue in construing or applying state law. However, if the grounds for the decision have fair support and rest upon a fair or substantial basis this court will not substitute its judgment as to what the state rule should be or determine whether it is right or wrong. *Demorest v. City Bank Co.*, 64 S. Ct. 384, 321 U.S. 36, 88 L. Ed. 526 (1944).

The decision of the Washington State Supreme Court is fair and reasonable under all the circumstances and has more than adequate support of prior Washington law. The court reviewed the applicable decisions relating to both the "disclaimer clause" and river boundary issues. It found that prior decisions including the case of *Washougal Transportation Co. v. Dalles, etc. Nav. Co.*, 27 Wash. 490, 68 P. 74 (1902) had never applied the "disclaimer clause" to rivers. On the contrary, the decisions concerning boundaries on rivers subscribe to the shifting boundary rules, i.e., gradual changes of the high water mark result in a corresponding shift in the boundary line. These decisions in many instances denied any

effect of the existence or location of meander lines. The shifting boundary rule was relied upon by the Washington State Supreme Court in *Ghione v. State*, 26 Wn.2d 635, 175 P.2d 955 (1946). The same result was had in *Glenn v. Wagner*, 199 Wash. 160, 90 P.2d 734 (1939).

The Washington court specifically indicated the existence of meander lines in the Duwamish River was unimportant in *Newell v. Loeb*, 77 Wash. 182, 137 P. 811 (1913) and in *Hill v. Newell*, 86 Wash. 227, 149 P. 951 (1915). In a case between private parties the court in *Rue v. Oregon and Washington R. Co.*, 109 Wash. 436, 186 P. 107 (1920) adopted the shifting boundary rule and stated that meander lines were not boundary lines.

The result of *George v. Pierce County*, 111 Wash. 495, 191 P. 406 (1920), clearly implies the "disclaimer clause" is of no effect in determining ownership problems due to the shifting of rivers.

The petitioners' view of the import of the decision in *Washougal Transportation Co. v. Dalles, etc., Nav. Co., supra*, is clearly shown to be erroneous by the court's analysis of that case. The case of *Anderson-Tully Co. v. Murphee*, 153 F.2d 874 (8th Cir. 1946), relied upon by petitioners, is not controlling. It was an appeal from a Federal District Court decision where state law was being interpreted. The case does not involve a situation where

a federal court was rehearing state action in light of the Fourteenth Amendment.

The Washington State Court decision is clearly not an abrupt change in the law regarding vested rights. Section 2 of Article XVII of the Washington State Constitution has never been applied to solving boundary disputes in rivers. The decision is based upon a fair and well reasoned analysis of the cases involving the "disclaimer clause". It is clear that the decision has ample foundation in Washington law.

CONCLUSION

The question of ownership regarding the area between the line of ordinary high water and the meander line, when the meander line falls out in the water area, is not controlled by federal law. This has been an area repeatedly held to be subject to state law. The petitioner urged as much in the state court below. Nowhere has he pointed out wherein the state court decision is contrary to federal law.

The decision below is correct in light of all the prior decisions by the Supreme Court of the State of Washington and is clearly in line with the plain meaning of section 2 of Article XVII of the Washington State Constitution. It has overwhelmingly fair and substantial support in law. Nowhere do the records or decisions indicate that this decision evades any federal constitutional rights. It is a state court

decision fairly and reasonably decided containing no substantial federal questions.

The State of Washington urges the court to deny the petition for Writ of Certiorari.

Respectfully submitted,

SLADE GORTON,
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THEODORE O. TORVE,
Assistant Attorney General,
Counsel for Respondents.

APPENDIX A

Excerpts from Brief of Respondents Smith Tug & Barge Co. and The Big Creek and Telocaset Company in Smith Tug & Barge Co., et al. v. Columbia-Pacific Towing Corp., et al. on appeal from the Superior Court of Cowlitz County to the Washington State Supreme Court, written by Judson T. Klingberg and Gerry A. Reitsch:

"ARGUMENT IN SUPPORT OF JUDGMENT

I. * * *

A. * * *

B. *Interpretation of the Constitutional Disclaimer is Controlled by State Not Federal Law*

As recognized by the United States Supreme Court in *Borax v. City of Los Angeles*, 296 U.S. 10, 80 L.Ed. 9, p. 18, 56 S.Ct. 23 (1935):

> 'Rights and interests in the tideland, which is subject to the sovereignty of the State, are matters of local law.'

Likewise, in *Fox River Paper Company v. Railroad Commission*, 274 U.S. 651, 71 L.Ed. 1279, 47 S.Ct. 669 (1926), the Supreme Court stated:

> '* * * the nature and extent of the rights of the state and of riparian owners of navigable waters within the state and to the soil beneath are matters of state law to be determined by the statutes and judicial decisions of the state (citing cases). If the state chooses to resign to the

> riparian proprietor, sovereign rights over navigable rivers which it acquired upon assuming statehood, it is not for others to raise objections.'

See also, *Washougal Transp. Co. v. Dalles, Etc., Navigation Co.*, 27 Wash. 490, 498, 68 Pac. 74 (1902); *Brace & Hergert Mill Co. v. State*, 49 Wash. 326, 95 Pac. 278 (1908).

C. *Upon Admission to the Union the State Became the Owner of River Beds and Tide Lands*

The navigability of the Columbia and Cowlitz Rivers is undisputed (see Appellants' Brief, p. 9). Lands underlying navigable waters, such as the beds of the rivers here involved, became the property of the State of Washington upon its admission to the Union.

Shively v. Bowlby, 152 U.S. 1, 26-31, 38 L.Ed. 331, 341-343, 14 S.Ct. 548 (1893)

Scott v. Lattig, 227 U.S. 229, 242, 57 L.Ed. 490, 33 S.Ct. 490 (1913)

United States v. Utah, 283 U.S. 64, 75 L.Ed. 844, 51 S.Ct. 438 (1930) (Colorado, Green and Grand Rivers)

D. *After Admission, the State Had the Absolute Right and Power of Disposition Over Such Lands*

* * *

II. APPLICATION OF FEDERAL LAW

A. * * *

B. * * *

C. *Federal and State Rules are Not Incompatible*

The Federal interpretation of grants made by its patents is not incompatible with interpretations which this court has put upon the constitutional disclaimer. Thus, the extent of the grant conveyed by a Federal patent is a matter of Federal Law. The Federal courts have said that such grants carry to the line of ordinary high water and accretions belong to the owner of land abutting the navigable waters. The State cannot diminish such grants as it attempted in *Hughes v. State*, 67 Wn.2d 799, 410 P.2d 20 (1966) and was prevented from so doing by the U. S. Supreme Court in *Hughes v. Washington*, 389 U.S. 290, 19 L.Ed.2d 530, 88 S.Ct. 438 (1967).

On the other hand, the extent to which the State has disclaimed tide, swamp and overflowed lands under the state constitution is a matter of State law. Thus, where the meander line runs above or landward of the line of ordinary high water due to accretions, the high water mark controls and the successor in interest of the patentee owns to that line because Federal Law controls. Where the meander line runs below or riverward of the line of ordinary high water, the meander line is the boundary because State Law controls and the State, by its disclaimer,

has, in effect, conveyed such land to the successor of the patentee.

In *Hughes v. Washington*, supra, the U. S. Supreme Court did not purport, either directly or indirectly, to overrule any Washington decision other than that of Hughes itself.

* * * "